

DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 7 - 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Newspaper/Radio Cross-Ownership)
Waiver Policy)
)
To the Commission:)

MM Docket No. 96-197

JOINT COMMENTS OF
COX ENTERPRISES, INC AND MEDIA GENERAL, INC.

Werner K. Hartenberger
John R. Feore, Jr.
Suzanne M. Perry
Peter J. Siembab

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 776-2000

Attorneys for
Cox Enterprises, Inc.
Media General, Inc.

February 7, 1997

No. of Copies rec'd
List ABCDE

014

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	i
INTRODUCTION	1
I. THE COMMISSION SHOULD ADOPT A NEWSPAPER/RADIO CROSS-OWNERSHIP WAIVER POLICY	3
II. A WAIVER POLICY SHOULD FOCUS ON DIVERSITY AND INDEPENDENT VOICES	8
III. ANY WAIVER POLICY MUST BE BASED ON OBJECTIVE CRITERIA	9
A. 30 Independent Voices Will Ensure Diversity and Competition	10
B. Market Size Should Not Be a Factor	11
C. "Voices" Should Include Daily Newspapers, AM, FM and Television Stations, CATV Systems and MMDS Systems	12
D. The Relative Strength of Individual Voices Should Not Be Considered	16
IV. AN ADDITIONAL PUBLIC INTEREST SHOWING IS UNNECESSARY	19
V. WAIVERS SHOULD BE PERMITTED FOR FAILED AND DISTRESSED STATIONS	21
VI. ANY WAIVER POLICY SHOULD BE LIBERAL, REFLECTING THE RULE'S UNDERLYING CONSTITUTIONAL INFIRMITY	21
CONCLUSION	26

SUMMARY OF ARGUMENT

The Joint Parties support liberalization of the outdated newspaper/radio cross-ownership rule by adoption of a policy to grant waivers in any situation, regardless of market size, where at least 30 independent media "voices" would remain and the newspaper/radio station owner would own no more than the number of stations permitted under the radio ownership rules. In counting independent voices, all radio stations whose defining signal contours (1 mV/m contours for FM stations and 2 mV/m contours for AM stations) and all television stations whose Grade A contours intersect the affected station's contour should be included, as should all CATV and MMDS systems having subscribers within that area and all daily newspapers published in communities within that area.

Thirty voices is an accepted measure of diversity and competition. Additional consideration of market size is unnecessary and inappropriate: the presence of thirty independent voices in a market, regardless of its size, establishes more than sufficient diversity and competition to ensure that a waiver will comport with the public interest.

The "voices" to be considered should include noncommercial as well as commercial stations. Noncommercial stations broadcast the type of news and public service programming that form the focus of the Commission's diversity concerns. They seek support from the same entities that advertise on commercial stations. Such stations thus are clearly alternative sources of competition and diversity.

Television as well as radio stations should also be counted: it would be completely illogical to retain television/newspaper and radio/television cross-ownership restrictions while excluding them from voices that add to diversity and competition.

Finally, cable systems and MMDS systems, with their vast multi-channel capacity, likewise contribute significantly to diversity and competition and must be included in "voice" calculations if those calculations are to be accurate measures of actual market diversity and competition.

The relative "strength" of voices within the marketplace should not be considered. Not only is strength a difficult concept to articulate and measure: making such evaluations would be antithetical to the Commission's long held belief that 51 voices are better than 50, regardless of the volume of the 51st voice. The Commission's cross-ownership rules make no distinctions based on the particular identity of the entities subject to their prohibitions, and a waiver policy should be similarly neutral.

Grant of a waiver should not preclude acquisition of other stations or cable systems if otherwise consistent with the Commission's ownership rules.

If the 30-voice standard is satisfied, there should be no requirement for an additional public interest showing. The Commission does not require such showings to support waivers of the one-to-a-market rule, and, particularly in light of newspaper owners' past exemplary record as broadcast licensees, there is no need for such an extraordinary requirement for newspaper-radio waiver requests.

The Commission should follow its past precedent and grant waivers in situations involving stations and newspapers that have failed or are in financial distress. Waivers should also be granted to permit reacquisition of a previously-owned facility.

Adoption of the waiver policy outlined above would be a long-overdue, modest modification of a rule that cannot be justified by contemporary market conditions and

constitutional interpretation. The Joint Parties urge the Commission not only to take this small first step toward realigning its regulatory structure with marketplace reality, but also to institute proceedings looking toward complete elimination of its outdated and repressive newspaper/broadcast cross-ownership rule.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Newspaper/Radio Cross-Ownership)	MM Docket No. 96-197
Waiver Policy)	
)	
To the Commission:)	

JOINT COMMENTS

Cox Enterprises, Inc. and Media General, Inc. ["Joint Parties"],^{1/} by their attorneys, submit herewith their Joint Comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.^{2/}

INTRODUCTION

The Commission's newspaper/broadcast cross-ownership rule^{3/} is an anachronistic relic of a long-extinct media world. In today's environment of extraordinary media diversity and cutthroat competition, the rule's restrictions distort those competitive workings of the marketplace that produce optimal public service. The Joint Parties therefore urge the Commission promptly to institute proceedings looking toward its total elimination. As a modest interim step in the right direction, the Joint Parties support liberalization of the newspaper/radio

^{1/} Both Joint Parties have broadcast and newspaper interests and therefore share a significant interest in media ownership regulations which accurately reflect the competitive realities of today's media marketplace.

^{2/} Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Inquiry, MM Docket No. 96-197, FCC 96-381 (October 1, 1996) ["NOI"].

^{3/} 47 C.F.R. §§ 73.3555(d)(1) [AM stations]; (d)(2) [FM stations]; (d)(3) [TV stations].

cross-ownership prohibition in this proceeding through adoption of objective, readily-applied waiver standards.⁴

In particular, the Joint Parties urge the Commission to waive the newspaper/radio cross-ownership prohibition in any situation, regardless of market size, where at least 30 independent media "voices" would remain and the newspaper/radio station owner would own no more than the number of stations permitted under the radio ownership rules.⁵ For purposes of this rule, voices should include commercial and noncommercial AM, FM and television stations; other daily newspapers; CATV systems; and MMDS systems. The market should be defined as the area within the smallest defining contour of the commonly-owned radio station(s).⁶

The Joint Parties submit that a 30-voice showing is more than adequate for waiver purposes so that there is no need for any additional public interest showing. Waivers also should be available in special circumstances involving financial distress of either the newspaper or the broadcast station and the reacquisition of previously-owned interests.

⁴/ The Joint Parties submit that neither the U.S. Constitution nor the current multimedia market support continuation of any prohibition on newspaper ownership of broadcast stations. They therefore urge the Commission to promptly institute proceedings looking toward deletion of the newspaper/broadcast cross-ownership rule. In recognition of the limited scope of this proceeding, however, these Joint Comments only address issues related to the appropriate standard for waiving the newspaper/radio cross-ownership rule.

⁵/ 47 C.F.R. § 73.3555(a).

⁶/ Recognizing the Commission's reluctance to grant any relief from the newspaper/radio cross-ownership prohibition, the Joint Parties' proposed market definition is extraordinarily conservative. Alternatively, the market could be defined as the county in which the commonly-owned newspaper is published and any other county in which the newspaper has at least 10% of daily newspaper circulation.

The Joint Parties submit that this waiver policy would create opportunities for investment, efficiencies and enhanced radio service to the public that are fully consistent with the public interest.

I. THE COMMISSION SHOULD ADOPT A NEWSPAPER/RADIO CROSS-OWNERSHIP WAIVER POLICY

The newspaper/broadcast cross-ownership rule has been one of the most stringently-applied regulations in Commission history: in the two decades of its existence, it has been permanently waived in only two situations, both involving extraordinarily unique circumstances and the reacquisition of previously-held interests.⁷ In part, this virtually flat refusal to waive the rule was caused by Congressional intervention. In December 1987, Congress attached a statutory prohibition on changes in the newspaper/broadcast cross-ownership rule to the Commission's appropriation.⁸ This provision's legislative history and plain language indicate that it was specifically targeted at newspaper/television cross-ownership.⁹ The prohibition's language was then modified in 1988, however, to make clear that its coverage extended to

^{7/} Field Communications Corp., 65 FCC 2d 959 (1977) [waiver to permit reinstatement of prior ownership]; Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993), aff'd sub nom., Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995) [waiver to permit reacquisition of the New York Post].

^{8/} Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-23 (1987). Although the purported purpose of this prohibition was to protect the integrity of the rule, the legislative history and language of this proviso indicate that Congress was concerned about the potential for abuse presented by a single entity's ownership of a television station and a newspaper in the same market.

^{9/} For example, shortly after its enactment, it was noted that television and newspapers served as the general public's primary information sources. 134 Cong. Rec. S61 (daily ed. January 28, 1988).

newspaper/radio cross-ownership, primarily to refute claims that it was aimed at a single individual and, therefore, constitutionally infirm.¹⁰

The Congressional embargo on modification of the broadcast/newspaper cross-ownership rule continued until the Commission's 1994 appropriation. That legislation permitted the Commission to "amend policies with respect to waivers" of the rule involving AM and FM stations.¹¹ The provision's legislative history recognized the Commission's then-recent modification of its local radio ownership rules,¹² and concluded that "... it may now be appropriate to permit the FCC to establish a more liberal policy with respect to waivers permitting cross-ownership of newspapers and radio stations."¹³ The Congressional conferees suggested that waivers be allowed "only in the top 25 markets where at least 30 independent broadcast voices remain" if the Commission makes a separate affirmative determination that "there are specified benefits to the service provided to the public sufficient to offset the reduction in diversity which would result from the waiver."¹⁴

¹⁰/ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2217 (1988).

¹¹/ 107 Stat. 1167 (1993).

¹²/ Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992) ["Radio Ownership"], recons. 7 FCC Rcd 6387 (1992), further recons., 9 FCC Rcd 7183 (1994).

¹³/ Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies for the Fiscal Year ending September 30, 1994, and for other Purposes, H.Rep. 103-293, 103d Cong., 1st Sess. (1993) at 2.

¹⁴/ Id.

This direction was Congress' final action in the area: subsequent appropriations legislation did not refer to the newspaper/broadcast cross-ownership prohibition, and no provision of the Telecommunications Act of 1996^{15/} expressly mentions the rule.^{16/} The 1996 Act does, however, generally direct the Commission to review all of its broadcast ownership restrictions biennially to determine whether they are still necessary in light of competitive circumstances.^{17/}

As the NOI recognizes, the Commission has full authority to modify or eliminate its newspaper/broadcast cross-ownership rule. NOI, par. 7. This authority should be exercised, at a bare minimum, to adopt a policy allowing waivers of the newspaper/radio broadcast prohibition.^{18/}

^{15/} P.L. 104-104, 110 Stat. 56 (1996) ["1996 Act"].

^{16/} The Stearns Amendment to H.R. 1555 would have repealed the newspaper/broadcast prohibition, but it was not included in the Act as finally adopted.

^{17/} 1996 Act, Section 202(h). It is interesting to note that the dissenting views in the House Report to the 1996 Act refer to Section 73.3555 as prohibiting common ownership of a television station and a local newspaper and urges retention of that prohibition, but not the newspaper/radio cross-ownership rule. H.Rep. No. 104-204, 104th Cong., 2d Sess. (1995) at 220.

^{18/} It should be noted that the Department of Justice has contended that radio advertising constitutes a market distinct from newspaper advertising. See American Radio, *supra*. The Commission's newspaper/radio cross-ownership rule, on the other hand, is based on the assumption that the newspapers and radio stations compete in the same market. The government cannot have it both ways. If DOJ is correct, there is no reason for the newspaper/radio cross-ownership rule based on economic competition and it must be deleted rather than merely waived in limited circumstances.

Both the NOI and numerous other Commission documents accept the obvious fact that the media marketplace has been transformed over the past few decades.^{19/} The number of television stations has increased. The cable industry has developed and matured into a capable and experienced competitor to the once-unchallenged television industry, with systems' channel capacity and diverse program offerings providing viewers with a variety of program choices unimaginable in the mid-1970's. DBS is a significant and growing competitive force. MMDS is becoming more competitive. Satellite DARS is on the horizon. Telephone company entry into the video programming and distribution marketplace has begun and may ultimately transform video competition. Radio, in particular, has grown so dramatically that Congress decided in the 1996 Act to liberalize substantially the Commission's local radio ownership restrictions.^{20/}

In contrast to this ongoing explosion of broadcast and broadcast-related media, the daily newspaper industry has imploded. The increase in the number of radio and television stations and cable television systems has been contrasted by a continuing decrease in the number of daily newspapers. Since adoption of the newspaper/broadcast cross-ownership rule, the number of radio stations has increased forty-six percent.^{21/} In contrast, the number of English language newspapers has decreased eleven percent.^{22/} This decrease reflects both the increasing economic

^{19/} See, e.g., Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making, 10 FCC Rcd 3524 (1995); Radio Ownership, *supra*.

^{20/} 1996 Act, Section 202(b)(1).

^{21/} NOI at par. 9.

^{22/} Id. Although the cross-ownership restriction is not solely responsible for the increase in radio stations and decrease in newspapers, the Commission has recognized that the

difficulties faced by newspapers and the extraordinary competition for audience/readers and advertising dollars in today's media market. In this environment, restrictions on newspapers' ability to expand their investments and explore new opportunities for service conflict with rather than further the public interest. The Joint Parties therefore urge the Commission to exercise its authority to permit permanent waivers of the newspaper/radio cross-ownership rule in specific circumstances.

There was no showing of abuses stemming from common ownership when the rule was adopted.^{23/} Rather, the rule was viewed as a prophylactic against the purely speculative possibility of anticompetitive behavior. There is neither need nor reason to continue such speculation because the market's current competitive structure now ensures even less likelihood of abuse.

When it adopted the rule, the Commission specifically acknowledged newspapers' contribution to the development of the broadcast industry and their public service tradition.^{24/} The time is now ripe to allow newspaper owners to resume those contributions.

cross-ownership rule may have had an effect on these two industries. NOI at par. 9. As a result, the rule may have had the unintended consequence of diminishing diversity of viewpoint and economic competition.

^{23/} Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, Docket No. 18110, 50 FCC 2d 1046, 1072-1073, 1085, 1089 (1975) ["Second Report"], recons., 53 FCC 2d 589 (1975), aff'd sub nom., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) ["NCCB"].

^{24/} Id. at 1075.

II. A WAIVER POLICY SHOULD FOCUS ON DIVERSITY AND INDEPENDENT VOICES

The newspaper/radio cross-ownership prohibition " . . . rests on the twin goals of promoting diversity of viewpoint and economic competition."^{25/} Diversity, however, is and has been the agency's dominant concern.^{26/} Diversity concerns should likewise guide the Commission's decision in this proceeding. Regulation of economic competition is not this agency's primary responsibility. The Department of Justice ["DOJ"] and the Federal Trade Commission have principal and separate federal antitrust enforcement authority in that area. They have not hesitated to exercise it to restrict media ownership.^{27/} In light of those agencies' authority and the Commission's limited antitrust responsibility,^{28/} the waiver policy adopted herein must focus on the preservation of diversity. To the extent economic competition is a factor in the waiver equation, it should complement rather than supplant considerations concerning the independence of voices.

^{25/} NOI at par. 3. These Joint Comments will not repeat the NOI's recitation of the restriction's administrative and judicial history.

^{26/} Id.; see also Second Report at 1079.

^{27/} See, e.g., In the Matter of Time Warner, Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc. and Liberty Media Corporation, Agreement Containing Consent Order, File No. 961-0004, 61 Fed. Reg. 50301 (September 12, 1996); Shareholders of Citicasters, Inc., FCC 96-380 (September 17, 1996); United States v. American Radio Systems Corporation, No. 1:96CV02459 (D.D.C., Oct. 24, 1996) ["American Radio"].

^{28/} Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making, MM Dockets Nos. 91-221 and 87-7, FCC 96-438 (November 7, 1996) at par. 5; Tele-Communications, Inc., DA-94-832 (August 1, 1994); cf., Elimination of Unnecessary Broadcast Regulations, MM Docket No. 83-842, 57 RR 2d 913, 921 (1985).

III. ANY WAIVER POLICY MUST BE BASED ON OBJECTIVE CRITERIA

The waiver policy adopted herein should be based on the following readily ascertainable and applicable objective criteria:

- (a) a newspaper/radio combination should be permitted if it satisfies a 30-voices standard, which appropriately measures sufficient diversity;
- (b) market size is irrelevant;
- (c) voices should include all significant media that contribute to diversity; and
- (d) the relative strength of voices is immaterial.

Past Commission ownership restrictions have relied on bright lines as the fairest and best way to further the public interest. For example, the Commission included a fixed standard in its television duopoly rule to provide certainty and flexibility.^{29/} The Commission's current policy concerning television satellite stations includes specific standards for satellite operations.^{30/} The Commission's one-to-a-market waiver policy likewise incorporates concrete guidelines.^{31/}

Here, too, objective criteria should govern the availability of newspaper/radio cross-ownership waivers. Readily understandable waiver prerequisites facilitate planning and investment by affected parties. They ease processing and regulatory decision-making. The Commission chose objective standards for one-to-a-market rule waivers because "... the numbers chosen are so clear and unambiguous that our own staff, waiver applicants, and other

^{29/} Multiple Ownership Rules, 22 FCC 2d 306 (1970), recons., 28 FCC 2d 662 (1971).

^{30/} Television Satellite Stations, Report and Order, MM Docket No. 87-8, 6 FCC Rcd 4212 (1991) ["Satellite Order"], recons. pending.

^{31/} Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, MM Docket No. 87-8, 4 FCC Rcd 1741 (1989) ["One-to-a-Market Order"].

parties will be readily able to calculate and easily ascertain the results.”³² The Joint Parties urge adoption of similarly objective waiver standards here.

A. 30 Independent Voices Will Ensure Diversity and Competition

Newspaper/radio cross-ownership waivers should be available if there will continue to be 30 independent, unaffiliated voices remaining in the market. Thirty voices has become an accepted standard for diversity and competition. It first appeared as a component of the one-to-a-market waiver standard,³³ based in large part on recommendations of NTIA and comments of NBC.³⁴ At that time, the Commission characterized its standard as “conservative” and one that “may far exceed the market size and number of voices necessary to ensure diversity and prevent competitive abuses.”³⁵ The Commission also noted: “In terms of both our diversity and competition concerns, the number of separate owners in the market may be the best measure of potential competition among stations and of the likelihood of diversity of editorial viewpoints and program formats.”³⁶

Congress subsequently accepted 30 voices as a valid level of acceptable diversity. For example, Section 202(d) the 1996 Act directs the Commission to extend its “30-voice” television duopoly waiver standard to the top 50 markets. As noted above, Congressional committees

³²/ One-to-a-Market Order, supra, 4 FCC Rcd at 1752.

³³/ See 47 C.F.R. § 73.3555(c).

³⁴/ One-to-a-Market Order, supra, 4 FCC Rcd at 1752.

³⁵/ Id. at 1751.

³⁶/ Id.

recommended the use of such a standard in granting newspaper/radio cross-ownership waivers. Moreover, the 30-voice test in practice does not even begin to measure actual diversity. It has not, for example, included the multiple services carried on a single cable system, national newspapers such as USA Today or The Wall Street Journal, satellite-delivered DBS and DARS services, magazines, electronic information sources or other media that all contribute to diversity. A 30-voice standard is indeed "conservative" and would clearly guarantee more than sufficient diversity to protect the public interest.³⁷

B. Market Size Should Not Be a Factor

Although 30 voices has been coupled with market size in administering ownership waivers, the Joint Parties submit that a market size component is unnecessary to a newspaper/radio waiver test. If there are thirty independent sources of news and information available to an individual listener, and thirty alternative outlets available to an advertiser, the size of the market where the listener or advertiser is located is irrelevant. A small city listener who can receive thirty independent voices has available to him exactly the same extent and type of diversity as a big city listener who also can receive thirty independent voices. Similarly, a small city advertiser who can select from among thirty independently-owned media outlets has the same choices as an advertiser in a larger community. Smaller markets may have many voices.³⁸

^{37/} The court in WSB, Inc. v. FCC, 85 F.3d 695 (D.C. Cir. 1996) recognized that a 30-voice diversity standard is a "high" standard which more than adequately protects diversity and competition.

^{38/} As the Commission stated in its One-to-a-Market Order, "It is our view that even below the top 25 markets or in a market with far fewer than 30 voices or owners, diversity and competition exist to such an extent that it is appropriate to take into account the efficiencies and

Since the FCC's principal concern is and should continue to be diversity, it is the number of voices and not the size of the market that should control a waiver standard.³⁹

C. "Voices" Should Include Daily Newspapers, AM, FM and Television Stations, CATV Systems and MMDS Systems

The "voices" to be considered in measuring remaining diversity should include commercial and noncommercial radio stations, daily newspapers, commercial and noncommercial television stations, cable television systems and MMDS systems.

Television Stations. The "voices" within a market should include all television stations that place a Grade A contour over all or part of the market. The Commission currently (but, the Joint Parties submit, wrongly) flatly bars television/newspaper cross-ownership, 47 C.F.R. § 73.3555(d)(3), a prohibition that necessarily assumes that daily newspaper and television stations each have a market "voice." The Commission also currently limits common ownership of co-located radio and television stations, 47 C.F.R. § 73.3555(c), reflecting a similar assumption about radio and television stations. It cannot at the same time retain these two rules and refuse to include television stations in the mix of "voices" used in administering a newspaper/radio waiver standard. Logic and consistency in the Commission's ownership regulations demand that television stations be considered alternative voices.

other benefits of allowing joint station operations." One-to-a-Market Order, 4 FCC Rcd at 1752.

^{39/} It should be noted that the Commission has granted numerous one-to-a-market rule waivers to stations in smaller markets that satisfied the 30-voice standard. See, e.g., U.S. Radio Stations, L.P., 3 CR 416 (1996); Ramar Communications, Inc., 7 FCC Rcd 3310 (1992); Great American Television and Radio Co., Inc., 4 FCC Rcd 6347 (1989).

Commercial/Noncommercial Stations. A newspaper/radio cross-ownership waiver policy should count both commercial and noncommercial radio and television stations.^{40/} Noncommercial stations clearly contribute to diversity by presenting local issue and public affairs programming. If the Commission excludes non-broadcast media because of their purported lack of discussion of local issues,^{41/} it cannot at the same time exclude noncommercial stations which air such discussions. Arbitrarily excluding noncommercial stations from the mix of cognizable voices artificially reduces the measure of actual market diversity.

Nonbroadcast Media. The NOI suggests that non-broadcast media should not be considered voices because they purportedly do not provide programming on local issues. Id. at par. 12. An assumption that cable television systems do not provide local programming is simply incorrect. The NOI itself recognizes that cable systems must provide access channels that serve as forums for discussions of issues of local concern. Cable systems also lease access time for the presentation of local programming. An increasing number of cable systems provide their own locally-originated news and information programming.

^{40/} As recognized at paragraph 12 of the NOI, the Commission's ownership rules are not consistent in their consideration of noncommercial stations: they are counted for purposes of the one-to-a-market rule, but excluded when determining the radio market for purposes of the radio duopoly rule.

^{41/} See NOI at par. 12. As discussed below, however, the Joint Parties do not believe that non-broadcast media should be excluded because diversity is a broader concept than the Commission's narrow focus on local issue discussion would suggest.

Even if the NOI's assumption were correct, it reflects too narrow a focus on local news and public affairs programming as the sole measure of diversity.⁴² Other types of informational (and even entertainment) programming⁴³ also contribute to informing the electorate. For example, a program on cancer could provide information that could shape a viewer's thinking on health care and thus influence his voting decision. A program on endangered species could shape a viewer's thinking on environmental issues and similarly influence his voting decision. Local news and public affairs programming demonstrably is not the only type of programming that makes a significant contribution to an informed electorate.

In any event, purely local news and information may be a small part of any one medium's total news output. Television stations carry news, but a substantial portion of that news may be provided by a network or a national news service. Locally-produced news programs may rely on wire services or other sources and may include both regional and national news. Many radio stations do not have substantial local news staffs but rely on wire services, networks and other sources. Newspapers, too, may carry a substantial amount of material from wire sources and other non-local sources. Given such considerations, it is clear that a "voice" should be

^{42/} The Commission has long recognized that the public interest is served by the presentation of many types of programming. Report and Statement of Policy re Commission En Banc Programming Inquiry, 44 FCC 2303 (1960). The narrowing of the public interest concept reflected by the NOI's discussion of diversity cannot be reconciled with the long line of post-En Banc Inquiry precedent. Diversity extends to more than merely local election coverage. Compare NOI at par. 14.

^{43/} One need only refer to episodes of entertainment programs dealing with issues such as abortion and gay rights to realize that entertainment can also contribute to the development of ideas concerning significant community issues. See, e.g., "TV's Powerful Doctor Shows vs. the H.M.O.," The New York Times (December 22, 1996) at H41.

inclusively defined and include at a minimum commercial and noncommercial radio and television stations, daily newspapers and cable television systems.

This definition still will significantly understate actual available diversity because no consideration will be given to national newspapers (USA Today and The Wall Street Journal)⁴⁴ and magazines with local and regional content even though they contain an extraordinary amount of news and information that informs the electorate. Non-daily newspapers also are excluded, even though they can be more local and focussed in nature than national newspapers.

Cable television systems. As noted above, contrary to the Commission's suppositions, cable systems carry a significant, and growing, amount of local news and public affairs programming. Cable television systems carry a wide variety of programming services that, while not always hard news or traditional public affairs, nonetheless educate and inform and thereby contribute to an informed electorate. Cable television has been recognized as a speaker with First Amendment rights,⁴⁵ and may well be the single most diverse medium of mass communications. Cable systems' presence in a market clearly contributes substantially to available diversity.

The fact that not all persons in a market subscribe to cable does not detract from that contribution. Newspapers also charge for their service and are not read in every household, yet the Commission obviously does not consider that a bar to including them among contributors to

44/ See Evening News Association, 59 RR 2d 1054 (1986).

45/ Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

market diversity. Moreover, CATV penetration even in markets having the lowest penetration levels is higher than the listenership/viewership of individual stations. To exclude CATV from a measure of market diversity is to take an ostrich-like view of the marketplace that makes no sense.

MMDS. Similar considerations apply with respect to MMDS. This service is also a speaker within the marketplace. Indeed, the MMDS/CATV cross-ownership prohibition⁴⁶ stands as regulatory recognition of MMDS' status as a contributor to diversity and competition. That prohibition cannot logically be retained if MMDS systems are excluded from "voice" calculations.

D. The Relative Strength of Individual Voices Should Not Be Considered

The NOI suggests that waiver standards might incorporate some measure of the relative strength of various voices. NOI at pars. 11, 20. The Joint Parties submit that such subjective and variable considerations have no place in a waiver standard. Indeed, evaluation of the relative strength of various media would be completely inconsistent with the Commission's long-held belief that 51 voices are better than 50:⁴⁷ that assumption expressly excludes consideration of the volume of the 51st voice.

For purposes of assessing diversity of voices reaching a listener or viewer, it is the number of voices among which a listener or viewer can choose which is relevant, not the relative

^{46/} 47 U.S.C. § 533(a).

^{47/} Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, Docket No. 18110, 22 FCC 2d 306, 311 (1970).

strength or actual distribution of choices. As long as numerous sources of news and information are available, concentration of consumers' choices on several media reflects the homogeneity of consumer preferences -- the success of a particular voice -- and not undue concentration among information sources or an inadequate number of gatekeepers. Measures of relative demand for various outlets are not appropriate to assess conditions in the marketplace of ideas.

"Strength" is likewise a difficult concept to articulate and measure: is it share of audience, audience during prime viewing/listening hours, class of station, extent of contour or advertising revenues?⁴⁸ None of these factors has any particular relationship to a voice's contribution to diversity, particularly if one accepts the Commission's long-held "more is better" approach. Moreover, the "strength" of a particular station or newspaper can vary tremendously with the vagaries of the reading, listening and viewing public. A waiver policy should not be based on such undefinable, evanescent and legalistic considerations.

Ownership of Other Media. Grant of a waiver should not preclude acquisition of other stations or cable systems if otherwise consistent with the Commission's rules. At present, a single entity may own up to eight radio stations in a community and could also own cable television systems within those stations' service areas. In such circumstances, discriminating against newspaper owners as the one class of entities that cannot own other media is grossly

⁴⁸/ If the Commission nevertheless should decide to adopt some measure of a voice's strength, it should not adopt a test based on advertising dollars or a similar economic consideration. Such matters, if they are at all relevant, are within the province of the Department of Justice and the Federal Trade Commission and have no place in a communications agency's regulations.

unfair and without rational basis.^{49/} If there are sufficient other independent “voices” within a market, a newspaper owner should be on the same footing as any broadcast station owner. Why should one entity be permitted to own eight radio stations, while a newspaper owner must seek extraordinary relief to own even one station? If the Commission’s 50/51 voice assumption is correct, then the number of media voices a single entity can own should not matter as long as sufficient alternative independent voices remain. Newspaper owners should be allowed to own as many voices in the market as are permitted by the FCC’s local radio and other ownership rules.^{50/}

The Geographic Market. The newspaper/radio cross-ownership prohibition affects daily newspapers published in communities completely encompassed by the 1 mV/m contour of an FM station and the 2 mV/m contour of an AM station. These contours define the scope of the rule; logically, they must also define the scope of the market used in evaluating waiver requests. In counting independent voices, all radio stations whose defining signal contours and all television stations whose Grade A contours intersect in whole or in part^{51/} the affected station’s contour should be counted, as should all CATV and MMDS systems having subscribers within that area and all daily newspapers published in communities within that area.

^{49/} New multichannel video providers can control multiple sources of information to the home while radio and television stations have but one, yet these new market entrants are almost entirely unburdened by ownership restrictions.

^{50/} This would be the one instance in which market size would become a factor because the radio duopoly rules include such considerations.

^{51/} Consistent with the radio duopoly rule, an encompassment requirement is inappropriate; rather, a station would be considered a voice if its defining contour overlapped the market in which the newspaper is published.

IV. AN ADDITIONAL PUBLIC INTEREST SHOWING IS UNNECESSARY

As discussed above, a Congressional committee at one time apparently contemplated that newspaper/radio waiver applicants would be required to submit a separate public interest showing in addition to a showing based on voices/market size. Such a requirement was never part of a law, and the statute to which it relates has been superseded by the deregulatory provisions of the 1996 Act.

Moreover, in adopting the top 25 markets/30 voices standard for one-to-a-market rule waivers, the Commission declined to require additional public interest showings. It noted that such a requirement would be unnecessary because

. . . we have already determined that [economic] efficiencies generally exist and that the benefits of permitting radio-TV combinations in these markets with many competing voices will generally not undermine the benefits flowing from our traditional procompetitive and diversity policies. This conclusion is based on the fact that a very large number of broadcast outlets and separate voices will remain in these large markets, thereby preventing any single outlet or firm from obtaining undue economic power or undue sway over public opinion.

The Commission thus is not obligated and has already found in the context of other cross-ownership rulemakings that there is no need to require a special public interest showing in addition to a diversity showing. One-to-a-Market Order, *supra*, 4 FCC Red at 1751. The Commission should reach a similar conclusion here.

The Second Report recognized that newspaper-owned broadcast stations had rendered a substantial public service and excelled in newsgathering and public affairs programming. More recent Commission decisions recognize that common media ownership can foster diversity and

competition, in general, and the availability of informational programming in particular.^{52/} It is clear that newspaper owners, already committed to local service and news coverage, would continue that commitment in their operation of broadcast stations, just as they did before the Commission's prohibition.^{53/} Extraordinary public interest justifications are thus unnecessary to waiver requests.

The benefits of common newspaper/radio ownership -- which carry with them the same type of economic efficiencies as radio/television combinations or multiple radio ownership -- will not undermine the benefits flowing from traditional procompetitive and diversity policies. A 30-voice standard will ensure that common ownership will not adversely affect competition and diversity. In such circumstances, an additional public interest showing would be superfluous.^{54/}

^{52/} See, e.g., Second Report and Order, MM Docket No. 87-7, 65 RR 2d 1589 (1989); Golden West Broadcasters, 10 FCC Rcd 2081, 2084 (1995).

^{53/} For example, Media General's grandfathered newspaper and television station in Tampa, Florida have joined together in investigating and seeking solutions for "The Racial Divide," a project that combines broadcast and newspaper coverage on racial issues with establishment of internal and community advisory boards, community forums and opinion polls to present ongoing and in-depth coverage on race and racism in the Tampa Bay Area.

^{54/} The Commission also should not adopt an economic cap on market power. NOI at par. 20. Such matters are within the province of DOJ and the Federal Trade Commission. Those agencies' above-cited recent actions demonstrate that they can be relied upon to take action to prevent undue economic concentration.